JUSTICE 2 COMMITTEE

Monday 14 January 2002
(*Afternoon*)

Session 1

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JUSTICE 2 COMMITTEE
2nd Meeting 2002, Session 1

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Bill Aitken (Glasgow) (Con)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)
Mr Duncan Hamilton (Highlands and Islands) (SNP)
George Lyon (Argyll and Bute) (LD)
*Mr Alasdair Morrison (Western Isles) (Lab)
*Stewart Stevenson (Banff and Buchan) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Rhoda Grant (Highlands and Islands) (Lab)
Maureen Macmillan (Highlands and Islands) (Lab)

WITNESSES

Lloyd Austin (Scottish Environment LINK)
Alan Blackshaw
Dr Dorothy Breckenridge (Scottish Outdoor Recreation Network)
Councillor Michael Foxley (Highland Council)
Ann Fraser (Scottish Sports Association)
Councillor David Green (Highland Council)
Dr Peter Higgins (Scottish Outdoor Recreation Network)
Bruce Logan (Scottish Countryside Access Network)
Linda Mathieson (Scottish Countryside Access Network)
John Mayhew (Scottish Environment LINK)
Dave Morris (Scottish Environment LINK)
Fran Pothecary (Scottish Sports Association)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Claire Menzies

ASSISTANT CLERK

Fiona Groves

LOCATION

Townhouse, Inverness

Scottish Parliament

Justice 2 Committee

Monday 14 January 2002

(*Afternoon*)

[THE CONVENER *opened the meeting in private at 14:01*]

14:19

Meeting continued in public.

The Convener (Pauline McNeill): I formally open this meeting of the Scottish Parliament Justice 2 Committee to the public and welcome everyone to the city of Inverness. This is the first time that the Justice 2 Committee has met outside Edinburgh and we are very pleased to be in Inverness. It is great to see such a wonderful turnout for our meeting.

I welcome to the committee Rhoda Grant and Maureen Macmillan; I am glad that they are able to be with us this afternoon. We are also accompanied by a full entourage: our witnesses, from whom we will hear shortly; the official report; and our clerks, to whom a special word of thanks is due for the work that they have done to get us here. The arrangements for today's meeting may look seamless, but I can assure people that getting seven MSPs, the official report and security to Inverness is no easy task.

Our main item of business this afternoon is stage 1 consideration of the Land Reform (Scotland) Bill. I have received apologies from two committee members: George Lyon, who is attending another meeting this afternoon, and Duncan Hamilton. I ask members to turn off their mobile phones and pagers.

Members will recall that the committee has agreed to carry out an inquiry into the issues raised by petition PE336, which relates to asbestos victims. I draw members' attention to last week's press, which reported Lord Cullen's announcement that a judge, Lord Mackay, will regularly hear cases from asbestos victims in the Court of Session. That seems to be an important development affecting the work of this committee; it looks like a genuine breakthrough. I propose to write to Lord Cullen on behalf of the committee to clarify what the arrangements are, so that we can determine whether we need to proceed with our inquiry. We may take the view that all that can be achieved has been achieved.

Stewart Stevenson (Banff and Buchan) (SNP): No member of the committee would disagree that the action that Lord Cullen has taken is a welcome development. I look forward to hearing the details in due course. It is entirely appropriate that we view Lord Cullen's announcement positively.

Scott Barrie (Dunfermline West) (Lab): Following the resignation of Margaret Ewing from the committee, did we appoint another reporter on this matter, or did you agree to deal with it, convener?

The Convener: That is Scott Barrie's way of volunteering me for something. We asked for a volunteer to serve as a reporter on the issue, but following the change in membership of the committee I agreed to take charge of it until the committee had decided whether it wished to appoint another reporter. The committee felt that the matter was a high enough priority for us to continue to pursue it in the meantime. Once I have received a reply from Lord Cullen—in, I hope, the not-too-distant future—the committee can decide whether it wishes to take the matter further.

Land Reform (Scotland) Bill: Stage 1

The Convener: This afternoon the committee will hear from six sets of witnesses. Members do not have to leave today's meeting by a specific time, so I propose to allow as much room for questions as possible.

I welcome our first witness, Alan Blackshaw. Thank you for your written submissions, which have been very helpful. If you are happy, we will proceed straight to questions, although I will ensure that, following questions, you are given the chance to raise any issues that you do not feel have been covered.

Bill Aitken (Glasgow) (Con): Good afternoon, Mr Blackshaw. At this early stage in our consideration of the Land Reform (Scotland) Bill, we have received contradictory evidence about the state of the current law on access. What is your opinion of the current law on the matter and what will the effect of the bill be?

Alan Blackshaw: I identified the problem when I became a main board member of Scottish Natural Heritage in 1992. We have consistently recommended a full-scale multidisciplinary review of the law, similar to that which the Scottish Law Commission carried out of the law of the foreshore.

Basically, the position is as stated by Tom Johnston MP in 1942. He said:

"Any member of the public is at liberty to walk over any land in Scotland provided he does so without damage to crops or fences and does not commit a breach of the various Poaching Acts. This applies to the whole country with the exception of private gardens or grounds which form the curtilage of a dwelling house or other private residence."

He also said:

"there is no law of trespass in Scotland."

Bill Aitken: In a judgment in June 2000, Lord Reed effectively said the same thing—that what is not specifically prohibited is permitted. Do you agree?

Alan Blackshaw: Lord Reed also said that in a lecture at Aberdeen University. That basic principle applies in England and Scotland. In 1979, Sir Robert Megarry said the same thing. It means that Scotland is not a place where everything is forbidden except what is permitted; it is a place where everything is permitted except what is forbidden.

Bill Aitken: Would it be fair to say that perhaps there is no requirement to legislate on access, as the freedoms that people desire already exist?

Alan Blackshaw: The freedoms exist, but the bill would be beneficial for the reason that you state: the situation has become confused and there is not agreement. The same reason for having legislation applies as in Norway, where there was an act that said:

"The Outdoor Recreation Act ensures this public right of access and thus confirms a right of common law with a long tradition in Norway."

That is what the purpose of the bill should be. It is necessary because the situation is so confused.

Bill Aitken: I will turn to the so-called law of trespass. Do you agree that the law of trespass has no legal force?

Alan Blackshaw: The meaning of the term "no law of trespass" is that there is no reason why someone should not go on to land; it is harmless and has no particular legal effect, as Tom Johnston said. Lord President Clyde said that trespass is not a legal term. Therefore, I agree with you.

Bill Aitken: We sometimes hear the term "right of way". Sometimes it appears in deeds of condition—in the context of sale of properties, for example. How will the new access rights interact with rights of way?

Alan Blackshaw: Where they exist, the rights of way will continue, so the two rights will run in parallel. The rights of way will be beneficial because they apply all the time; they constitute an important right, which overrides other rights, such as rights of property.

Bill Aitken: Is not there an inconsistency in having rights of way when—according to Mr Johnston and Lord Reed—there is no prohibition on access?

Alan Blackshaw: That is correct. However, Lord Reed's statement that everything is permitted except what is forbidden also applies to the landowner. Although the landowner might not have any legal backing, he is not prevented from trying to limit access. The value of the right of way is that it overrides the landowner's ability to interrupt access. That is why the right of way is important where there is landowner opposition. In general, however, there is no landowner opposition.

Bill Aitken: Do you agree that in the vast majority of cases access is denied by a physical barrier, such as the erection of fences, and not by a legal statement?

Alan Blackshaw: That is correct. That was the position in the 19th century, when access to the Highlands was closed. There was no legal provision for that, but the landowner was able to do it as a matter of fact.

Bill Aitken: I will be careful not to put words into your mouth. Would it be a fair summation of what you are saying that, although the part of the bill that deals with access is a useful clarification, it will do little to add to existing legal rights?

Alan Blackshaw: The bill is beneficial. It adds to legal rights in various areas—for example, to the rights of people on horses and, to some extent, on water. However, existing rights—if they were agreed on—would be as strong in relation to walking over land as what is proposed in the bill.

The Convener: On that point, the Law Society of Scotland told us last week that the bill as drafted gives people more rights than exist at present. Do you agree?

Alan Blackshaw: That is why we need the multidisciplinary study. I do not think that the bill gives more rights. Tom Johnston was correct to say that the existing liberty is very strong. My work on the LINK access research project showed how strong the existing rights are. However, those rights can be interrupted. The effect of the bill will be to stop them being interrupted except in agreed circumstances.

14:30

Stewart Stevenson: The generally accepted figure seems to be that 100 landowners own 60 per cent of the land in the Highlands. Is legal provision of access underpinned by the justification that the changing pattern of ownership has meant that many owners do not understand the traditional access rights that have been provided in the Highlands and throughout Scotland? Is that perhaps one reason why we now need to codify and legislate?

Alan Blackshaw: That is one reason, but Scottish landowners have generally accepted the Tom Johnston view. Some overseas landowners, such as those at Letterewe, share that concept, but it is correct that the traditional understanding has been eroded. However, many landowners are supportive.

The Convener: In your view, if the bill is passed, what will be the relationship between the common law, as it currently stands, and the statutory provision. How would they sit together?

Alan Blackshaw: Section 5(3) provides that the bill does not interfere with the common-law rights. The question is: what is the nature of the common-law rights? The problem is that there are two Government positions: the 1959 position, which is that trespass is not a civil wrong, and the 1967 position, which is that trespass is a civil wrong. It is unprecedented that there should be two Government positions on the same issue.

In some areas, the bill interrupts the common-law rights, as the Scottish Law Commission has highlighted. For example, it is obviously necessary to preserve the curtilage and the security of Balmoral and the Queen's private estate; however, that is an extensive area. Common-law rights will run where the statutory right does not. There is a major problem of overlap between the two but, provided that the remedies under the statute are not stronger than the remedies under common law, there is no reason why the bill should not work quite well.

The Convener: What do you mean by "remedies"?

Alan Blackshaw: The draft bill had many remedies that were objectionable. Fortunately, the present version of the bill has no remedies other than the common-law remedies of interdict. As long as that continues, that is fine.

Section 11 provides that land can be exempted. One presumes that, where land is taken out of the right of access, the common-law right would still continue. That is where the problems of overlap arise.

The Convener: Your view is that the common-law right would still exist. Would there still be some confusion about that?

Alan Blackshaw: There is a confusion, as paragraph 6 of the Scottish Law Commission's submission clearly says:

> "To the extent that the rights overlapped, the public would be entitled to elect which category of right they were exercising and therefore whether it was regulated by the statutory scheme or not."

The way in which the bill has been drawn up—creating a right of access but not interfering with common-law rights—means that the two will run in parallel. There is no great harm in that, as long as the statutory right is not weaker than the common-law right.

The Convener: I want to ask about enforcement in practice. If the bill is enacted, will it be part of civil law, criminal law or both?

Alan Blackshaw: It would not be part of criminal law. Byelaws can have criminal effect, but I do not think that the rest of the bill will have any criminal impact. Many criminal provisions already exist, particularly to do with aggravated trespass and the protection of wildlife. Those provisions will continue, but the bill as drafted will create nothing that will add to the criminal deterrent to access. The draft version, of course, added a great deal, which is why it was so objectionable and so great a departure from Scottish traditions.

The Convener: Under the bill, if a person is exercising the right of access on land that is not exempt and in a way that they believe to be responsible, but a landowner or land manager

takes a different view, who will resolve that situation?

Alan Blackshaw: Traditionally, there have not been many disputes in the main mountain areas. If such a situation arose and the person concerned felt that the land manager was acting reasonably, I presume that he would agree with the land manager. If the person felt that the land manager was acting unreasonably, there would be a problem. If that problem went to the stage of either of the people becoming hostile, there could be a breach of the peace. The police can come if there is a breach of the peace or malicious mischief, but they cannot come if the case is simply one of someone being harmlessly on land and the landowner not liking that, for whatever reason.

The Convener: I am interested in this issue. I note that such situations would arise only in a minority of cases and that, by and large, people would exercise their rights responsibly and land managers and owners would act responsibly, with the result that there would be no disputes. However, the Justice 2 Committee has to think about the implications of how the bill will operate in practice. I can foresee situations in which there could be disputes between two parties. Would there then be implications for the police?

Alan Blackshaw: A breach of the peace would be for the police to deal with. The police were consulted over whether there should be increased criminality of trespass after Michael Fagan broke into Buckingham Palace in 1982. At that time, the Scottish Police Federation said that it did not need increased powers because the breach of the peace legislation in Scotland was sufficiently flexible to allow the police to deal with any situation that had become a real problem. It would appear, therefore, that the police have enough powers already. However, if the situation is not to reach the stage at which there is a breach of the peace, both sides will have to act responsibly.

The Convener: Breach of the peace is a wide common-law crime. However, if someone is simply walking across land, believing that they are responsibly exercising their rights, but the land manager believes that they are not, there has been no breach of the peace. We have heard of such cases in which the police have been called and have become involved. We are talking about civil law and my worry is that we must have some way of ensuring that disputes can be resolved. Is there a role for another person—for example, a ranger employed by the local authority?

Alan Blackshaw: The police and the rangers need to be clear about the problems that involve a breach of the peace and the problems that do not. Information on that has to be published. If someone is harmlessly on land, they are free to stay there under existing common law. That is what Tom Johnston says. There is no reason why a landowner should object to someone being harmlessly on the land. If the person is not there harmlessly, that could be a breach of the peace. The issue is difficult, particularly on the edges of towns.

The experience of the past 30 or 40 years has shown that there have been few such problems. In 1961, the Scottish Landowners Federation proposed changes to the law of trespass. The Government said that it would be willing to consider change if the federation could produce examples of what the problems were. The federation did a trawl of all its members but was unable to come up with any examples. If something was an on-going problem, it could be discussed in the access forum.

Maureen Macmillan (Highlands and Islands) (Lab): I am glad that you mentioned the possibility of discussing problems in the access forum. In the recent past, there have been problems with defining harm in the countryside. During the foot-and-mouth outbreak, landowners who may have had only one deer on their hill banned people from access to the mountains. There was a dispute about what would constitute harm. There must be some way of resolving that. Do you think that the access forum would be the appropriate place to do that?

Alan Blackshaw: Yes. The experience of the access forum has been beneficial, not because there have not been disagreements, but because there has been an opportunity to discuss things. It is regrettable that the bill contains no provision for a national access forum. There is such a forum in England. It is strange that an idea that was proposed in Scotland, where there has been much experience of the issue over the past five years, has been omitted from the bill. I am a strong believer in the benefits of having an access forum. The experience in Europe has shown that such consultative arrangements are extremely beneficial.

Stewart Stevenson: Your evidence contrasts the common-law rights with those that would be granted under the bill. We have had much negative feedback on section 9(2)(a), which does not extend the access rights to people undertaking commercial operations. Currently, commercial operations, by which one might mean guides and small-scale activities, are exercising common-law rights without incurring charges for access or other commercial burdens. How would that be affected by the provision in the bill that excludes such people form the new access rights? Would that affect the operations of hill guides and the like?

Alan Blackshaw: That is a serious problem. It has not arisen under the common law because, in general, common law has been commercial. There

are drove roads from Shetland to London; Scotland is criss-crossed with old drove roads. Miners have had to get to work. All that activity is commercial. There has never been a distinction. However, if there is an event or something that involves placing facilities on the land, it is reasonable that the landowner should receive some benefit. That is absolutely fair.

In the past, there has never been a distinction between someone doing something commercially or doing it for himself. Once again, the Norwegians have the right answer. The leaflet entitled "Free access to the Norwegian countryside" shows that it does not matter whether one is acting as a guide or as a private individual. That is the case throughout Europe. All that the leaflet says in relation to commercial activity is that there is a question as to whether one requires a licence to hunt or fish. That is plainly commercial and is okay.

The Parliament should not try to make the distinction, as that would be a cause of many problems in the future and would be adverse to tourism. For example, someone who was a photographer and wanted access could be seen to be acting commercially. A distinction would give grounds for the landowner to ask people whether they were on the land for commercial reasons. It would make the right of access feel insecure. The purpose of the bill is to make people feel that their access rights are quite clear. If someone asks you whether you are taking photographs commercially or whether you are a guide, that conflicts with the fundamental purpose of the bill and is objectionable.

14:45

Stewart Stevenson: I appreciate that the landowner would be entitled to charge a fee for large events, but what are the characteristics that distinguish an activity for which it would be proper for a landowner to make a charge and a traditional activity that involves someone earning a living through the exercise of access rights? If we delete section 9(2)(a), how can we ensure that we do not create more problems for landowners?

Alan Blackshaw: As I said, I think the provision should be limited to events that need to be planned and publicised and to which a number of people and spectators are coming. There might be a need for a form of payment for such an event, because it uses the land. The ordinary guide does not use the land. Although the landowner has exclusive rights to the use of the land, I do not think that someone walking over the land uses it in the same sense. If someone holds an event, that event will displace whatever the landowner might want to do on the land at that time. If someone grows potatoes, he stops the landowner from growing potatoes. If a mountain guide simply climbs a cliff that the landowner is not using, I do not see that that interferes with the landowner's exclusive rights to the use of the land. The key issue is whether the commercial use disturbs the landowner's use of the land.

Stewart Stevenson: Do you mean actual use or the right to use the land?

Alan Blackshaw: Actual use. The idea has not been worked on in sufficient depth but I think that the actual use of the land is the key issue.

Stewart Stevenson: I have one other little point before we move on. There are also concerns about night access. Do you make any distinction in law or in practice between providing access during the day and providing it at night?

Alan Blackshaw: No. There is no distinction to make. If there was a problem in a particularly sensitive area, a local authority byelaw might address it. In general, people are not concerned. There are provisions for keeping people away from houses and so that should be sufficient.

As the member knows, the matter was debated during the passage of the Countryside and Rights of Way Bill down south. It was decided that the distinction could not be made and no special provision was made for night access.

The Convener: Before Rhoda Grant asks her question, I have a point to make. If local authorities were given powers to restrict access to land at night, would not that be a restriction of the current law?

Alan Blackshaw: It depends upon the existing powers of byelaw. In principle, it would be a serious intrusion into existing common-law freedoms.

Rhoda Grant (Highlands and Islands) (Lab): I want to return to the point about commercial operators. In your evidence, you said that people would be protected by the common law and could exercise their rights of access under common law. Could commercial operators, for example mountain guides or people who are active in that sort of pursuit, exercise a right of access using the common law?

Alan Blackshaw: Yes, I think so. I do not think that there is any question anywhere, including in other countries, of mountain guides being restricted in the way that section 9(2)(a) could restrict them. As the member probably knows, from 1850 to about 1920, at the Sligachan Hotel on the Isle of Skye, up to 70 people would gather at a time with mountain guides, who were mostly paid local people. There was no question of any restriction of access or of their being treated differently.

It is unheard of for mountain guides to be treated differently. I have never heard of an example of that, except perhaps in high Himalayan peaks where royalties are charged for climbing Everest and so on. I have never seen that anywhere else. The Norwegians concentrate on commercial activities such as hunting and fishing. Landowners' income from such activities should be protected. That should not apply to somebody who works in a commercial or in a private sense—or maybe a bit of both—if his activity is the same whether it is commercial or private.

Rhoda Grant: Which commercial activities do you think would be affected by the bill as it is drafted?

Alan Blackshaw: The bill can be interpreted widely, in the sense that anyone who is doing something for money could be questioned about whether he or she is on the land commercially. That could extend to mountain guides, tourist guides, photographers or anyone else. Someone who goes to an area to see how they would describe it in a book could, technically, be engaged in commercial activity. There is an enormous field of people who would have to be stopped and interrogated, which is where the problem arises. Such provisions are not in legislation in other countries, other than in England. It is a serious difficulty.

Rhoda Grant: Is it necessary to include such a restriction, given that there is a right of responsible access, which would apply, for instance, if you were having a festival on somebody's land and were bringing in a huge number of people? Would the bill be better without the provision?

Alan Blackshaw: It does not do any harm to have it, but it really only repeats what is common sense, as you say. It would not do any harm to have something about big events just for clarification, but that should probably be in the outdoor access code. The key point is the reference to access being responsible on both sides. The definition of responsibility should be in the code and could be part of the arrangements for carrying out events. All that would be part of the code, which should be agreed between landowners and the organisations concerned. The definition could, and perhaps should, be left out of the bill. To the extent that it is needed, it should be in the code.

Scott Barrie: I would like to explore some of the evidence that we heard last week. The representatives from the National Farmers Union of Scotland were clear that there should be a different right of access to enclosed land from that to open land. Do you agree with that?

Alan Blackshaw: No. Our position is as stated by Tom Johnston: there should be liberty of access to all land in Scotland, except to curtilage.

The provision that says that access rights must be exercised responsibly means that an individual must take account of the circumstances in which they exercise their right of access. There does not need to be a distinction. The matter is for the code. The same right should apply to different circumstances, but it should be exercised differently, as appropriate in the circumstances.

Scott Barrie: Is curtilage adequately defined in the bill?

Alan Blackshaw: Yes. Curtilage is defined in the "Oxford English Dictionary" and old valuation and taxation laws contain assessments of curtilage. Broadly, it is defined as the immediate surroundings of a house and perhaps the field that is closely associated with it or the field up to the fence immediately round a house. Usually, about 30m would be a rule of thumb, but the area could be bigger.

Scott Barrie: Do you favour defining specific parameters in the bill, or is the meaning sufficiently understood?

Alan Blackshaw: That is where the local access forums come in, because circumstances are different in different parts of the country. If there is a problem, the issue should be discussed in the local access forum. An agreement that is satisfactory to everyone ought to be reached. I do not think that the definition should be very strict. We must be careful, because people might alter the layout of a property to meet any definition that is given. The matter is for the common sense of the local access forum.

Scott Barrie: Last week, we heard evidence from the Scottish Landowners Federation, which said that establishing a core paths network would be the best way of managing public access to our land. Is that assertion correct, or would such a network inhibit further access to our countryside?

Alan Blackshaw: It is beneficial to have a recognised path network. The more paths, the better. People need to be able to get out and about and paths are needed. However, as Shetland Islands Council said in evidence to the committee, if people focus too much on paths, they may not realise that, according to custom and tradition, they are free to go everywhere. That applies on the Scottish mainland, too. It would not be right to restrict access to paths, but to the extent that paths increase access and make it simpler from everyone's point of view, they are beneficial. It is desirable that money is available to develop the path network.

Scott Barrie: Should people's access to the countryside be defined by the core paths network?

Alan Blackshaw: No. When someone goes off

a path, that is perfectly okay, provided that doing so is harmless. If it causes no difficulty, people should not be restricted to paths.

Mr Alasdair Morrison (Western Isles) (Lab): Good afternoon. I have two questions for Mr Blackshaw—one on access and one on the crofting community right to buy and the community right to buy. If the access proposals become law and are implemented in six months' time, how will they affect landowners' behaviour? During the foot-and-mouth outbreak, some landowners selfishly denied access to land and did not appreciate the importance of informal access to the countryside. How would the proposals affect such selfish behaviour?

15:00

Alan Blackshaw: I quoted Tom Johnston earlier. There is a general acceptance that the proposals are similar to the existing common-law position. When I walk in the hills, my experience of landowners is that there is no problem—they give you a welcoming smile. In the past, people walking on uncultivated land have had little difficulty with landowners. There is no reason for the bill to cause any difficulties, but some bits of it might give some people cause to think that they can interrupt access.

We discussed restrictions on access rights for commercial users. Those restrictions would give landowners a new ability to ask questions of people. Landowners should not be able to do that.

There is no ill will on the part of landowners. That said, a key example of irresponsible restriction of access was the closure of the Cuillins during the foot-and-mouth crisis. The local community objected, which was exceptional, and asserted its common-law public right of access. Because of the importance of the Cuillins to tourism, the local community disregarded McLeod of McLeod's closure.

Mr Morrison: Exactly. In the case of the Cuillins, the least that we can say is that the landowner was consistent in his selfishness.

My second question relates to the definition of community in the context of the crofting community and the community right to buy. What is your definition of the word "community"?

Alan Blackshaw: I am afraid that my work is on the subject of access.

The Convener: Thank you. I have one final question. Would it make a difference if the bill included a presumption in favour of access?

Alan Blackshaw: That is an important question. Such a section should be added to the bill and should also include a duty on all public agencies, including the Executive, SNH and the local authorities, to promote the purposes of the bill. At present, that is missing. If it were included, we could be more relaxed about the powers, including those for local authorities. Paragraph 6.8 on page 39 of the access code contains useful wording, which sets out how public agencies should promote the right of access. It would be useful for that wording to be included in the bill. There is a precedent in England, as public agencies have a duty to observe the purposes of national parks.

The Convener: Thank you. Would you like to make any final points before we end the session?

Alan Blackshaw: Yes, I have two points to make. I sent the clerk a paper, which drew attention to some of the areas in which the committee faces a difficulty. I mentioned that the Government has two different positions on whether trespass is a civil wrong. On 1 December 1959, the Government's position, following the "First Report of the Law Reform Committee for Scotland," Cmnd 88, February 1957 was:

> "In England, a trespasser commits a civil wrong. In Scotland, he does not necessarily do so."—[*Official Report, House of Commons, Scottish Grand Committee*, December 1959; c 5.]

That is the long-standing position, which goes back to James Bryce. It is also the basis of the statement that Tom Johnston made. However, in Dr Dickson Mabon's statement of 18 April 1967, the Government position was the opposite. He said:

> "Our predecessors took the view that such provisions were unnecessary in Scotland. This view was often very largely—and erroneously—based on the belief that there is no law of trespass in Scotland and that every Scotsman enjoys as of right the freedom of the countryside … There is very little difference in the law of trespass in Scotland and England. In both countries, it is a civil offence against the personal right of property"—[*Official Report, House of Commons, Scottish Grand Committee*, 18 April 1967; c 11.]

That is the opposite of the 1959 statement. One of the main areas of work that I did for the LINK access research project, especially when the files became available under the 30-year rule, was to find out how the change came about. As far as I can see, it was not the subject of any Cabinet discussion or anything like that. It emerged from an external working group at the "Countryside in 1970" conference—study group 9. That group was led by planners, the Scottish Landowners Federation and Nature Conservancy. It said that, in both countries, trespass is a civil offence against the personal right of property. That is what went into the Dickson Mabon statement but, as far as we know, it has no validity. The problem with that is that, since then, the Countryside Commission for Scotland and Scottish Natural Heritage have had no choice but to follow the 1967 statement, even though it appears to be without foundation.

Dennis Canavan MP raised the matter with Henry McLeish MP, when he was the minister for civil justice. He would not say which of the two statements was correct. He said:

"I regret, therefore, that I am unable to say on what basis Mr Macpherson and Dr Dickson Mabon said what they did."

The difficulty is that the bill has been drafted, to a large extent, to redress the problems of the 1967 statement, whereas the population at large is still working on the concepts of the 1959 statement, believing that there is no law of trespass and we are free to go everywhere. There is a fundamental conflict. The fact that the Government has two diametrically opposed positions and is not willing to say which one is correct must be unprecedented. I hope that the committee will discuss the matter with the Executive and find out what it believes to be the correct position. That would help to get rid of the great deal of confusion that exists because of the double view of what the common-law rights are.

One of the purposes of the new view—as I call it—in 1967 was that there were to be access agreements, under which access to land would be paid for. The bill included a provision for £3 million, in today's money, for payments to landowners for access. There was an experiment involving three landowners—one of them was Colonel Grant of Rothiemurchus. When the proposal for an access agreement reached Inverness, Inverness council was requested to pay 25 per cent of the cost. The Inverness councillors—I presume that it was in this building—said that there was no reason why they should pay for something that they already had, thank you very much. They refused to have anything to do with the agreement. That was a major setback for the 1967 policy, but it did not stop the legal interpretation being built on by the CCS and SNH ever since. The financial objective was rightly stopped.

The Convener: So we have more than one reason to thank Inverness, even if it dates back to 1967. It seems appropriate that we are meeting here today. Thank you very much for your evidence, which has been very useful.

We move on to our second set of witnesses. The panel is extensive and consists of the Scottish Sports Association, the Scottish Countryside Access Network and the Scottish Outdoor Recreation Network.

I ask the witnesses to come forward. I understand that one of you has to leave at 3.40 pm.

Ann Fraser (Scottish Sports Association): I have to leave at 4 o'clock.

The Convener: We may take longer than that, but you will have to go.

Ann Fraser: I am slightly flexible.

The Convener: We will do our best to get you out on time. I ask Dr Peter Higgins to introduce the witnesses, as he knows them all.

Dr Peter Higgins (Scottish Outdoor Recreation Network): On my left are Bruce Logan and Linda Mathieson from the Scottish Countryside Access Network. Dorothy Breckenridge and I are from the Scottish Outdoor Recreation Network. Ann Fraser and Fran Pothecary are from the Scottish Sports Association.

The Convener: Thank you all for your submissions. We look forward to hearing your evidence.

Stewart Stevenson: I move straight to one of the subjects that we discussed with Alan Blackshaw—section 9(2)(a) on commercial access. I am interested in your views on how that might affect the operations of the people whom you represent.

Dr Higgins: The first issue is one of definition. It would be extremely difficult to define what is commercial and what is not. There are many different examples of that. An example from my own experience concerns a river canoeing activity at an outdoor centre on the west coast, at which I was helping. An angler on the river complained to the tutor that he was paying money to fish there and that the students were disturbing the fishing. Before the instructor could say anything, one of the boys from Port Glasgow—wee Jamie—said, "Mister, I've paid the centre to be here. What's more, I may be disturbing the fish, but I'm certainly not killing them." The centre was owned by a local authority and was in the public sector. It is now a charitable trust and is still owned by the local authority, but it has a commercial dimension as well. In such cases, it is difficult to work out who is who and what the current status is.

The second issue concerns challenges in relation to identification. If people do not know the status of an organisation, inevitably everyone will be challenged if the landowner or land manager wants to take issue.

Thirdly, there are a range of legal issues and difficulties that are associated with contract law. For example, if one has a contract with a client as a provider, is there any reason why that contract should be disclosed to a third party? I do not think so, but I do not know. I am not a specialist in such issues, but I believe that the provisions will result in a reduction in the perceived rights of access and, thereby, a reduction in the economic benefits to rural communities, which are significant. I can give more evidence on those benefits later, if members wish.

Dr Dorothy Breckenridge (Scottish Outdoor Recreation Network): There will be a presumption that there is a problem, and public perception is very important. The public perception of the problem of foot-and-mouth disease lasted far longer than the actual problem. Some people are still not taking their recreation in the countryside because they believe that there is a problem. People go to the countryside for enjoyment, regardless of whether they are with a guided party or with friends. They do not go for confrontation. If it is perceived that there will be a problem or confrontation, people will deny themselves access. That, in addition to the concerns that Peter Higgins identified, is a major outcome that will flow from the bill.

From a tourism perspective, visitors choose to come on holiday to Scotland to enjoy the landscape. If they perceive a problem with doing that, they will not come. If there are major problems because providers do not know who the landowner is—which is a general problem in Scotland—or if they face continual confrontation, that will cause emotional attrition to the people who take part in the activity, whether it is the provider who is challenged on the hill or the members of the group. That situation will erode the common-law practices of taking access in Scotland.

15:15

Stewart Stevenson: Would Alan Blackshaw's definition be acceptable to the witnesses? He said that when someone exercises access rights in a way that might deprive the landowner of his ability to exercise his rights—typically, when someone organises an event—it is perfectly reasonable that there should be a commercial arrangement between the event organisers and the landowner. That would be the test of the circumstances under which a commercial activity would be acceptable.

Dr Breckenridge: That takes place at present. For example, events such as T in the Park take place on private land. It is accepted that that is an event and people pay to take access when that event is taking place. Outwith that time, people can take access to walk as normal in the fields in those areas. That is just common sense and reasonable behaviour. The outdoor access code identifies that and provides suggestions for procedures in such cases. The recreation field has never regarded paying for additional facilities as a problem.

Fran Pothecary (Scottish Sports Association): We believe that it is inappropriate to include this provision in the bill, and that it can be dealt with in the code, which can deal with the nuances of different situations, from small commercial groups up to large events. The code can contain the detail that people need if they undertake events in the countryside. We believe that that should not be in included the bill and that detailed guidance about commercial, educational and business activity in the countryside should be contained in the code.

Bruce Logan (Scottish Countryside Access Network): To follow up that point, I refer you to the relevant parts of the code, which make the position plain. The code says:

> "In practice, it will sometimes be difficult to establish commercial from other forms of access and land managers are encouraged to continue to allow a wide range of commercial activities where these are undertaken responsibly and do not interfere with their own interests."

I am a member of the access forum, as are two members of this panel—Ann Fraser and Fran Pothecary—and this matter came up as an issue for discussion over a number of access forum meetings. Agreement was not reached on the issue, principally—I think—because it was not possible to agree any definition of the phrase "commercial activities." One of the land-owning interests was asked to come up with a definition, but either did not, or could not, do so. The view on this side of the table is that we should rely on what the code recommends.

The Convener: It is useful to have an insight into that matter. However, would you not have argued in the forum that the bill's provisions should not be detrimental to the current provisions?

Bruce Logan: I am sorry, but I do not follow you.

The Convener: Could you not have argued the principle that the bill's provisions should not be detrimental to the current provisions?

Bruce Logan: The access forum's position has always been that the bill should be a simple document that provides for universal access and that it should be subject to the provisions of the code, in as far as the exercise of that access is considered responsible by both access users and landowner managers.

Stewart Stevenson: Would a differentiation between day and night in respect of access rights create any difficulties?

Fran Pothecary: Yes. There is no doubt that such differentiation would be extremely difficult to implement. Concerns were raised in the consultation responses about the possibility of criminal activity at night if the right of access were to be extended to night-time hours. Our argument is that the commission of an offence, if you like, has absolutely nothing to do with the right of access. If somebody is going to commit an offence or behave irresponsibly, they will do so regardless

of whether they have a right of access.

The result of section 11(1)(d) would be that perfectly lawful access at night—for people coming off the hills or for wild camping—would be debarred or discouraged. Such prohibition would make no difference to people who wanted to behave irresponsibly or criminally in the countryside. We believe that the more access there is at night, the better. That would discourage those who want to undertake an offence.

Bill Aitken: What difference are the provisions on access likely to make? Perhaps Dr Higgins would give me an authoritative answer.

Dr Higgins: The issue is one of ideology and principle. Those of us who recreate or work as educators or commercial operators in the countryside are used to a range of traditional liberties. Periodically, however, we have experienced a number of what I shall call difficulties with psychological warfare—attrition, if you like—in respect of access to parts of the countryside. The bill, which I hope will soon become an act, should enshrine in law the ideology and principle that there is a right of free access to the countryside.

Bill Aitken: Will you give examples of where there has been such attrition?

Dr Higgins: I can give personal examples. I have a large range of such examples, but I will give only one, which relates to access to the hills at Glen Lyon. The person who owns the land undertakes a range of commercial activities there, such as pheasant shooting, deer stalking and grouse shooting. At almost any stage of the year, it is possible to argue that access should be denied to that land as a result of one or other of those activities. In consequence, fences and numerous signs deter access. My colleagues have many other examples, but I will confine myself to one.

Ann Fraser: I would like to say something more about the practical problems. Most people think that they have a general right of access to land, but users other than walkers—cyclists and horse-riders, for example—have faced challenges in the past 50 years or so and have found it difficult to get access to land. The bill will open up Scotland for us. Many landowners do not think that users other than walkers have any right of access to the countryside.

Bill Aitken: Dr Higgins mentioned Glen Lyon, where many activities are going on. It would clearly not be satisfactory to mix walkers with those who shoot—there are obvious dangers in that. Is not that slightly counterproductive in respect of your argument?

Dr Higgins: No, in so far as it is clearly not a good time to be on the hill when people are shooting. That said, people are being persuaded that the period in which they should not be there extends for much longer than the actual duration of the shootings. There are ways of finding out when shooting will take place. As a result, there should be no problem in that respect.

Shooting is as much a form of recreation as hillwalking and horse-riding, and it is possible for a piece of land to have multiple uses, as long as arrangements are in place. At the moment, those arrangements exist through consultation using the hill phone system, for example. If people were prepared to give appropriate notice of the times when they will be undertaking particular activities, it would be possible for others to avoid such areas at those times. The question whether or not access is allowed is quite separate.

Bill Aitken: So in summary—again, I am not trying to put words into anyone's mouth—you are saying that although the legislation does not add any specific rights, it will cause the psychological effects on people, and people's perception, to change completely and that that in itself is justification for the bill.

Dr Higgins: Yes, that is crucial. If the legislation does not do that, it does nothing.

Linda Mathieson (Scottish Countryside Access Network): I want to speak on behalf of access practitioners and SCAN. If the bill were passed, it would make a great difference to us.

I am a member of a local authority, but a whole range of other people is involved in SCAN; we have been trying for a long time to improve people's general access to the countryside. The current laws and facilities are difficult and we have found it hard to deliver access quickly, effectively and cost-effectively because we have become involved in long-winded access agreements with various landowners and farmers. Although those people are not anti-access—they are willing to give access to the land—the process of finding out and implementing how they want to control access is very complicated and can sometimes take three, four or five years.

Aberdeenshire Council is quite proactive and for the past four or five years has been trying to deliver access networks on the ground, which is the aim of the core path plan. However, because the process is so long and slow, we are still negotiating over two or three pieces of route in every network. As a result, we feel that the bill will provide us with more facility to deliver access more effectively and economically for the community of Scotland.

Stewart Stevenson: I have a brief question for Dr Higgins. Does the existing common-law right of access include a duty of care upon the landowner

who is conducting shooting to ensure that, before and during the operation, it is safe to start and to continue the activity?

Dr Higgins: That is my understanding.

Bill Aitken: I want to return to the issue of access during the hours of darkness. It was stated that there might be problems for people who, for example, were coming off the hills in daylight only to find dusk falling as they did so. Can you advance any argument whereby people should be on the land between 10 pm and 6 am?

Fran Pothecary: I would like to answer that question, but I did not catch the last part of it.

Bill Aitken: Would not a prohibition of access between 10 o'clock at night and six in the morning address the specific problem that I mentioned? For example, it would allow people who had been held up to get off the hills.

Fran Pothecary: No. There are many examples of people coming off the hills much later than 10 pm; indeed, I can attest to my own experience in that respect. Such a measure would not address the fact that many people will be out on the hills deliberately for a number of days or might be involved in a multi-day journey and undertaking wild camping. As a result, it would be impractical to regulate night-time access for recreational use.

Such a prohibition would also be key to people's understanding of where they should and should not be. Having exemptions creates tension, which makes people think, "We should not be here during the hours of darkness." There could be real problems if people try to hurry off the hill because they are thinking about what would, in effect, be a night-time curfew. That might not be in the best interests of the activity that they are undertaking or of their own safety.

15:30

Dr Higgins: I would like to add couple of points. First, imagine yourself as a birdwatcher who is very interested in birds at dawn and at dusk. The chances are that you would want to have access before dawn and after dusk.

My second point is philosophical. There are shades of nannying in what is proposed, which seems to suggest that people cannot look after themselves in the hours of darkness. When I work with people outdoors, it is part of my job to ensure that they are competent in all sorts of circumstances. That is a key skill. If the provision is allowable under the legislation, but is not enforced under the legislation, the situation could vary from one local authority area to the next, so some places would be no-go areas and others would not. That would lead to inconsistencies.

Maureen Macmillan: I want to return to what you said about Glen Lyon and the shooting and stalking activities that are carried out by the estate. If an estate applies to have land exempted so that access to it is denied, in order that shooting or stalking can take place, should not the estate have to offer an alternative route to people who want access?

Dr Breckenridge: To date, most places have offered alternative routes. I understand that, after discussions, the access forum came up with the hill phone system, whereby walkers can phone various numbers to find out whether the estate is shooting on a given date and what alternative routes are suggested. That seems to work fairly well. Glen Lyon is not part of the hill phone system, which is a voluntary scheme that has gradually expanded over the years. Fran Pothecary has been involved with that.

Maureen Macmillan: Does the system need to be strengthened?

Dr Breckenridge: I think that strengthening will come through the code, which gives advice. Local access forums are the right place for discussion on the matter, but it is also important to have something like the national access forum to provide national guidelines that others can work under. It is important, especially for visitors to Scotland, that the system can be easily understood. If there are lots of local differences, it is difficult for people to know where they can go, what they can do and when they can do it. We hope that the hill phone system will be available nationally. That is the way to go.

Maureen Macmillan: Are you happy that any current problems can be resolved?

Dr Breckenridge: Yes.

Fran Pothecary: It is important to understand that potentially conflicting activities such as hillwalking and stalking are performed at the moment without the need for closure of land under local authority orders. We see no reason why that should not continue under the Land Reform (Scotland) Bill. Guidance on how those activities should interact is outlined clearly in the code. By and large, those activities interact for 95 per cent of the time without a problem. Between August and October, people go on the hills and walk. As happens on the Mar Lodge estate, a simple sign that is erected on the day serves to indicate where shooting is taking place and to recommend that people go in a different direction. There is no need to close land because of such activities, and certainly not under local authority orders.

Rhoda Grant: I have a couple of supplementary questions about night-time access. Is not it the case that some landowners provide bothies in the hills so that people can stay there overnight? Are

not those bothies often life-saving, because people can go to them if the weather closes in and wait until they are rescued, until morning or until the weather clears?

Dr Breckenridge: The answer to both questions is yes.

In addition, if you have ever been out for a walk in the moonlight in wintertime, you will know that that is a profoundly moving experience. That is one of the reasons why I followed this vocation.

Bill Aitken: I am tempted to say that that depends on whom you are with.

Dr Breckenridge: It does not matter.

The Convener: We have heard from various people about whether the legislation will create more rights or take people's rights away. What is your view? I realise that you might not all share the same view.

Bruce Logan: Alan Blackshaw's point of view is respectable, but there is a different point of view—which I do not necessarily share—that one might call the conventional legal understanding of the position. I do not want to offer a judgment on which view might be correct, but I suggest that the purpose of the bill is to blow away the fog of uncertainty and confusion that creates a lack of confidence in users and to put in place a system that everyone can understand.

The Convener: Yes, but I am interested to know whether you think that the bill will preserve or reduce rights of access.

Bruce Logan: That question presupposes that I accept that there are existing rights of access. That question is still open, however. Of course, as Alan Blackshaw said, there could well be a problem about access to land that is excluded from the right to access. In that situation, there would be a question to do with the exercise of the right of access. I have no answer to that, other than to say that the situation is consistent with the status quo ante.

The Convener: You might not have had the chance to read the *Official Reports* of our previous meetings, but the Law Society of Scotland told us that it believes that the bill confers an increased set of rights on citizens.

Bruce Logan: That is good to hear.

The Convener: We do not agree with that opinion, incidentally.

Fran Pothecary: Alan Blackshaw pointed out that two perceptions exist of the right to access. One is a common-law perception that exists in the minds of people who undertake outdoor recreation and the other is to do with the rights that exist formally in statute. The Land Reform (Scotland) Bill has the potential to enshrine in law the common-law perception that, as long as people are not causing damage, they have a right of access to land and water. However, unless the bill is amended, it might undermine that. An example of the way in which it might do that is the exclusion of commercial and business activities. The definition in the bill would undermine people's perception of their right to undertake commercial activity on the land. The bill is a step in the right direction, but there are problems with its present form that might lead to a perception that the public had less right to be on land than they did previously.

The Convener: You think that the bill has the potential to enshrine the common-law perception with regard to access to land, provided that it addresses issues such as the powers of local authorities to determine whether people have access to the land during the night or are allowed to undertake commercial activity.

Dr Breckenridge: We would agree with that summation. We hope that improvements to the bill could simplify the situation to ensure that people are aware of the situation with regard to, for example, passing through farms, which is a traditional way to access land. Such things could be dealt with in the code, rather than in the bill. That would simplify the concept and perception of what we are allowed to do. The advisory parts should be included in the access code. That is what happens at present under the common-law tradition. We believe that we are acting responsibly.

The Convener: I will turn to the code in a minute. Before I do that, I am interested in the question that I put to Alan Blackshaw about deterrent and enforcement. Usually, when we confer rights in law, there is a way of enforcing them or providing a deterrent so that people act responsibly. I am not clear whether a deterrent is required in the bill. You describe what you call the challenges that you face in the countryside. Should the committee consider enforcement or do you think that that is not required?

Fran Pothecary: The bill as it stands would mean that landowners would have the same redress as they do currently. That is, they could ask somebody to move from their land. They could also invoke a process of interdict if they were concerned about somebody returning to their land and about that person's behaviour. Other remedies are proposed in the bill. For example, the bill gives much wider authority to local authorities to make byelaws in relation to all land and waters; authorities are currently able to do so only on their own land.

The bill will work by people understanding it and accepting its principles. Compliance with the bill

should be achieved as much as possible through education and guidance. That is why we believe that the access code is the tool by which the bill will be implemented. We have not found any reason so far to introduce criminal provisions to the bill. That is why there was such an outcry when they were included in the draft bill. Consultees said that there was no need for those provisions and that no problem existed. They believed strongly that the existing provisions for landowners to take action, for example, were sufficient.

Ann Fraser: At the moment, there is no great problem of irresponsible behaviour. The problem is the perception of some land managers that a mass of people will come on to the land when the bill is passed. I do not believe that that will happen. There will obviously be an increase in people on the land as people's confidence that they can go on to the land increases. Most people are highly responsible on the land. If a landowner puts up a sign, most recreationists will obey it. That was demonstrated during the foot-and-mouth disease outbreak. Scotland was immediately closed and everyone kept off the land. I cannot therefore envisage a great problem.

Linda Mathieson: Sections 2 and 3 deal respectively with the behaviour of individuals and of land managers, such as farmers. The local access forums that the bill proposes should be sufficient to deal with any dispute or concern about unreasonable behaviour. Such disputes or concerns should be dealt with in that way; they should not be dealt with through criminal law or through enforcement.

Maureen Macmillan: Without anybody being particularly irresponsible, the accumulation of people on a hill can cause environmental problems. I am talking about overnight camping, for example. In Glencoe, so many people wanted to camp wild overnight that a pollution problem developed. There were other problems, such as degradation of footpaths. How does that fit into the bill? How can we combat such problems?

Linda Mathieson: The answer relates to the code and the education process. It will be the responsibility of the agencies as well as individuals to ensure that people understand what they are doing when they are accessing the countryside and how they interact with it. If people understand better what effects they have on the countryside, that will, in time, ensure that they behave more reasonably. In certain situations, we will be able to put advisory notices up to explain what is happening. I am sure that people will adhere to those notices if they understand fully the reasons for them. That is how we should deal with the matter.

15:45

The Convener: I want to clarify your position. You are saying that if people exercise their right under the bill to walk about the countryside responsibly and there is a dispute with a landowner about whether they are doing so responsibly that can be dealt with by a civil remedy or a local access forum. Is that your position?

Do you not see the need for a ranger or someone else to assist in the determination of whether the person is acting responsibly—with the presumption of access?

Linda Mathieson: Rangers would have a role in an educational and advisory capacity, but not in a controlling capacity.

Dr Higgins: I support that. There is a sense in which people perceive access as a problem, but I perceive it as a right and an opportunity. All sorts of educational opportunities are associated with increased confidence in access to the countryside. Those benefits stretch from socioeconomic benefits to the local community to environmental understanding and awareness of the natural, cultural, social and historical heritage. We cannot have those benefits without a feeling of freedom to move in the countryside. I believe strongly that it is the role of the educator—whether teachers, outdoor instructors or rangers—to promote a code of responsible behaviour.

The Convener: I have to press you on this issue because we, as a justice committee, have to examine whether it is possible to enforce the provisions of the bill as a civil right.

I know what you believe in, but I am trying to examine whether you see potential problems.

I might decide, having watched every episode of "Monarch of the Glen", to go and see the countryside up there. In doing so I might come across three security guards or people employed by the estate to intimidate me into getting off the land. What would my remedy be at that point? How could I enforce my right?

That is the essence of the matter. If we believe in land reform and in giving people rights—perhaps by having a meeting in Inverness—people will, I hope, take from that the feeling that they should exercise their rights more freely. That is the Government's intention. I want to be sure that the committee does not need to add anything to the bill to ensure that people can exercise those rights in greater numbers.

Dr Breckinridge: At present, in the situation that you described, you might have a discussion with a security guard. There might be a local ranger, employed by the estate, who could mediate to some extent. If there were cause for

concern that you were being denied a common-law or statutory right to access and you did not agree with the mediation, good press coverage of the matter would probably change the estate's mind about its action. You would not necessarily have to go down the road of civil or criminal legal action apart from that of interdict. If there were a fracas at the site, that would be a breach of the peace and it would be dealt with.

Bruce Logan: There is a very real practical problem.

Let us consider a dispute between manager A and land user B, 10 miles from the nearest road or farm track. The conversation might go as follows. "You're acting irresponsibly." "No, I'm not." "Yes, you are." "No, I'm not." A dispute thereby arises, but how on earth might that be resolved practically? A land manager has no right of arrest, and cannot stop the person who may wish to be on the land, even if that is against the land manager's wishes. All he can do is say, "Hang on, you're acting really irresponsibly here, could you just hold on for a couple of hours?" while he whistles up the local ranger or policeman. That is impractical.

Bill Aitken: I accept that, but wish to put the converse point to you. Suppose the following situation arises—it may be difficult for you to accept that this might arise, and I fully appreciate that the people whom you represent will want to use the countryside for the benefit of all, and will behave responsibly. Suppose someone comes out from Glasgow and behaves irresponsibly on a day out.

The Convener: That is unlikely.

Bill Aitken: Yes, it may be unlikely. Suppose that their behaviour does not constitute a breach of the peace, nor vandalism as defined under the Criminal Justice (Scotland) Act 1980. The police would have no locus in such a matter. If rangers were present, would that not have some deterrent or educative effect?

Dr Higgins: The same situation would apply to a fracas between two people on a street in the middle of Glasgow if it, like the situation described by Mr Logan, did not reach the level of seriousness that you describe. It would present the same difficulty. If someone is misbehaving or behaving irresponsibly in the countryside, it is clearly an issue of concern. Essentially, there is nothing that one could do about it either way, apart from through recourse to a long, extensive process. At some point, we have to be pragmatic and admit that there are some things that we cannot fight, particularly if the problem is not a serious or repeated one. It is a similar situation to one that I recently experienced when someone kicked the wing mirror off my car on the street at night.

Bill Aitken: That is vandalism.

Dr Higgins: Yes, but the vandals often cannot be caught. There is nuisance associated with that and that is the level to which I am referring.

The Convener: Before Ann Fraser has to go, I would like to finish with some questions about the access code. I know that, in the view of some organisations among those that you represent, more provision should be contained in the access code than is in the bill. I would like you to address that question and to tell us your feelings about the access code, if you have had a chance to go through it.

Fran Pothecary: It was slightly unfortunate that the code was published later than the bill. In fact, I think that it arrived on the day when I submitted the SSA submission. I have looked at the code and think that it is written in a way that is accessible to people. It is understandable and includes summary pages. There is no doubt that it is through the code that people will interact with the bill, as the code is what they are likely to read. We need to include as much information as possible in the code to help people decide how to undertake their right of access when they enter a field of barley, for example.

Ann Fraser: I totally agree with what Fran has said. The code is easier to read than the bill, but much more needs to go into it. There is much in the bill that could be moved into the code. The code is more easily adapted if it is found at a later date that it is not suitable. It was produced by a consensus of all the bodies involved. It is hoped that that consensus will continue and that possible changes to the code will be referred to the national access forum for debate.

Linda Mathieson: I would like to make a point in support of the comments that Fran Pothecary and Ann Fraser have made. The more that is included in the code, where appropriate, the simpler and more understandable the legislation can be. The code could expand on some of the issues about which we are not very clear. It would be helpful for the code to be a source of guidance on some provisions in the bill that are not very easy to understand, where it would be unwieldy to include more information in the bill.

Dr Higgins: We see the code as a more organic aspect of the legislation than the bill. If it were articulated through the national access forum, that would allow for on-going consultation, which would be very positive. It would also ensure an overall consistency of approach and help to guide local access forums in carrying out their responsibilities. All the issues that we have discussed should be drawn together in a very simple bill with a more extensive and readily reviewed code.

The Convener: Would you like to make any points in summary that you do not feel have been covered?

Dr Higgins: I have been asked to say a few things. I have made half those points already, so I will not repeat myself.

The key issue is the mindset of the people who are seeking to gain access to the countryside and that of the people who manage the countryside, which are two sides of the same coin. Both sides need to understand the responsibilities, rights and work of the other. To think of the countryside as characterised by a conflict between recreational access and land managers is a gross oversimplification, with which we would not want to associate ourselves. It is important to realise that recreational economies are interdependent with rural economies in a very extensive way. In the long run, the economic benefits of countryside recreation and the ways in which people make their livings out of extended periods of occupancy of the countryside by recreational users will help to sustain jobs in rural communities. I can present members with a significant amount of evidence to that effect, if they would like to see it.

Initially, this legislation was driven by ideology. The aim was to enshrine in law a customary tradition of access to the countryside. That should be expressed in a very simple act that is easy to understand and welcoming of visitors. We need to bear in mind that in the modern world we are competing with Norway and other Scandinavian countries for visitors. Many of the issues that we have raised should be wrapped up in a code that can be reviewed.

We want there to be a simple, clear statement, so that everyone understands that they have a right of access to the countryside. All of us would benefit from that.

Thank you for dealing with us as a panel. I know that it has not always been easy during this evidence-taking session for members to know who to address themselves to and I apologise for any difficulties that that may have caused. Thank you for your time.

The Convener: This has been a very dynamic session. The fact that we managed to hear from all of you shows that we adopted the right format for questioning. Thank you for the work that you put into your written submissions and for your contribution today, which is much appreciated.

I propose that we take a short break.

15:59

Meeting adjourned.

16:17

On resuming—

The Convener: Welcome to the second part of the Justice 2 Committee meeting in Inverness. We are dealing with the Land Reform (Scotland) Bill.

Before we hear from our next witnesses, I remind members that they have received a copy of petition PE415, from Scottish Environment LINK. Some of the issues that the petition, which is being dealt with by the Public Petitions Committee, raises are addressed in the bill.

I welcome the representatives of Scottish Environment LINK to the committee. They are Dave Morris from the Ramblers Association Scotland, Lloyd Austin from RSPB Scotland and John Mayhew from the National Trust for Scotland. Thank you for sitting through all the other evidence this afternoon.

We will move straight to questions, but I will give the witnesses the opportunity to make comments at the end if they feel that any points have not been covered.

Bill Aitken: Good afternoon, gentlemen. The evidence that we heard earlier was somewhat contradictory. The first witness, Alan Blackshaw, said that the rights that the bill will confer on people already exist. The second group of witnesses indicated that the bill would underline the current situation, which would be very useful. What is your view?

Dave Morris (Scottish Environment LINK): I did not detect much controversy among the preceding witnesses. The fundamental point is that most people who are involved in outdoor recreation believe in the common-law position, as was expressed by Alan Blackshaw. However, the understanding is steadily being eroded by the attitudes of certain landowners and some public bodies. It is important that the bill secures the common-law position and confirms what most people who access the outdoors believe.

Bill Aitken: Previous witnesses described how one private estate had restricted access to some extent. You said that public authorities also do that from time to time. Can you cite an example?

Dave Morris: A couple of years ago, East of Scotland Water began putting up signs saying “No pedestrian access” on all the tracks leading up to their reservoirs. That was resolved with a little bit of therapeutic publicity.

Bill Aitken: Well done. Have there been any other instances in which public authorities have failed in their duty to allow access?

Dave Morris: From my colleagues who are involved with water issues, I know that there have been significant difficulties with Scottish and

Southern Energy plc. Difficulties are put in place in the sense that public bodies resist allowing access and suggest that people should not go canoeing or walking in certain areas. That is why it is so important that the bill imposes a duty on all public bodies to uphold the principles of the legislation, as Alan Blackshaw said.

Bill Aitken: Do you see any potential difficulties or dangers in connection with free access? I am thinking, for example, of some of the operations that the energy companies carry out, or, in the example that was cited earlier, of shooting going on while people are walking through the area.

Dave Morris: Safety is an increasingly important issue. It is often mentioned by the NFUS. We would look to the Forestry Commission and the forestry industry, as they have operated a policy of freedom of access for many years and they carry out many dangerous operations. That is particularly true of the Forestry Commission, which is Scotland's biggest landowner. The Forestry Commission has a sophisticated and well-understood signing policy, which advises people when to take extra care and when not to go into certain areas or interfere with log stacks. That system works well and a lot of those principles could be applied in relation to farming and other activities.

Bill Aitken: Do you agree that people walk and ramble in the countryside at their own risk?

Dave Morris: Yes, absolutely. In the access forum, there was total agreement from the outdoor recreation side that the bill should place no additional burdens on land managers. The NFUS supplied an important piece of information; it indicated that the insurance company NFU Mutual expected no rise in premiums as a result of the bill.

Bill Aitken: Do you agree that, to some extent, the bill might dilute the duty of care under the Occupiers' Liability (Scotland) Act 1960?

Dave Morris: Our understanding is that the Occupiers' Liability (Scotland) Act 1960 would continue unaffected by the bill. There is no disagreement between us and the land-managing interests on that issue. We consider the issue to be a technical matter that needs to be resolved in relation to the previous legislation. If necessary, the position should be written clearly and specifically into the bill.

Scott Barrie: Earlier this afternoon, I referred to some of the evidence that we heard last week. I do not know whether you have yet had a chance to look at the *Official Report* of that meeting. Do you believe that there should be different rights of access for enclosed land and open land, as the NFUS has advocated?

Dave Morris: No. The right of access should apply to all land. That is an important issue. We should consider what happens in other countries, particularly Norway and Sweden. When I travelled down the A9 with a senior official from the Swedish environmental protection agency, we discussed the land at either side of the road. I asked what the situation would be in Sweden. He made it absolutely clear that there would be freedom of access across all the land, as long as care was taken not to damage any crops.

Many people in local authorities say to me that, in order to secure a strong negotiating position and to get paths established, they have to start from the principle that the landowner realises that people have freedom of access. If that principle is in place, landowners are much more willing to negotiate paths and tracks through enclosed ground.

Scott Barrie: Last week, we took evidence from the Scottish Landowners Federation on the core path network. Do you agree that the establishment of the core path network is the best way of managing public access or do you see it inhibiting freedom of access to the countryside?

Dave Morris: A crucial part of the legislation is the modernisation of the arrangements for paths, so we totally support the development of a core path network. However, that must be done in a way that is carefully balanced against the general right of access. The Shetland Islands Council submission, which was mentioned earlier, shows how worried that local authority is. If we put too much emphasis on paths, we might lose the general freedom. We are not just talking about core paths; there are many other paths and tracks in the countryside that we expect people to make a lot of use of. Given the educational package that will accompany the bill, we think that the management of access to low ground will be relatively straightforward.

Stewart Stevenson: I will address the RSPB in particular, because I know that it owns land not only in Scotland but elsewhere. I have been focusing on commercial access. Do other regimes deal with that issue differently? What is the panel's view on section 9(2)(a), which excludes commercial interests from the granting of rights?

Lloyd Austin (Scottish Environment LINK): I will ask John Mayhew to comment on section 9(2)(a) in a moment. We see no difficulties with a right of responsible access to the RSPB's land holdings. Where a nature conservation issue that relates to reserve management objectives arises, in relation to looking after birds, for example, there are ways of addressing that through conservation legislation and through agreements with Scottish Natural Heritage, local authorities and so forth. Nature conservation access issues are addressed

by section 26, although in our evidence we suggest ways in which that provision could be improved. I will ask John Mayhew to comment on the commercial use of land, be it a nature reserve or otherwise.

John Mayhew (Scottish Environment LINK): We support what other witnesses have said, in that we do not think that commercial activities should be excluded from the right of responsible access. Any issues that arise from commercial activity should be dealt with in the code, not in the bill. I have a slightly different take on that, based on my experience of a land-managing organisation, which in my case was the National Trust for Scotland, although it applies to the other organisations in Scottish Environment LINK that manage land. In our view, the issue is the impact that groups make, not whether those groups are commercial.

I will give examples from the Highlands. Glencoe is a popular National Trust for Scotland property. It is heavily used by commercial groups, but also by charitable groups and charity events. Our experience there and at other large estates is that large or badly managed charity events can have greater impacts than small or well-managed commercial groups. Our concern is not whether the activity is commercial; our concern is the impact that the activity has on the ground—on the natural heritage, on the local community and on the activities of the land manager.

The code already deals with that quite well. I will not quote the whole code, but under the heading "The key responsibilities of the public", it says:

"Take special care if you are organising a group or event"

and consult managers

"if you wish … intensive or longer-term use of the place".

The code says that people should obtain permission if they require facilities or services and take

"adequate measures to ensure that impacts … are minimised."

That is the right approach. The larger the group, the more intense the likely impact and the more important it is to consult and co-operate with the manager, regardless of whether the activity is commercial.

It is important for local tourism economies that commercial groups are not excluded. The guides and the activity holidays that the committee has heard about perform economic activities that are important not only in their own right, but for the image of Scotland as an open and welcoming country in which access to the countryside is a good feature. Commercial activity should not be excluded from the right of access. All the issues should be dealt with in the code.

16:30

Stewart Stevenson: One thrust of the evidence has been that, by and large, the code should contain more, as Dave Morris said. When the NFUS gave us evidence, it suggested that the code should be substantially smaller—of the order of six pages. How do you reconcile the view that the code should be rich and big with the NFUS's view that the code will be accessible to the public only if it is small and simple to read?

Lloyd Austin: I will say a few introductory words and then hand over to Dave Morris. In our evidence, we suggest that the bill should include a better definition of the code's purpose, to make it clear that the code is intended to develop a way in which land managers, access takers and public agencies can interact and resolve their difficulties. If the bill contained a clearer definition of the code's purpose, rather than just details of how it will be produced and approved, that might give comfort to people who are concerned about the inclusion of certain provisions in the bill. I ask Dave Morris to say a few more words on our view of the balance between the bill and the code.

Dave Morris: I strongly endorse the idea that the code should contain as much detail as possible. I refer the committee to what Highland Council said in its submission—we need legislation that is simple to understand and to administer. That principle is important. We want everything to be in the code. If someone wants to know how to go about in the countryside responsibly, we should be able to say, "It's in the code."

I have some difficulty with the NFUS's position. I spent many days in the access forum negotiating on the code and it was my impression that the code was long because the NFUS and the SLF wanted more and more detail.

The discussions were useful. It was always the intention that simpler codes for particular activities would be produced from the code, so that what someone had in their hand when they entered an Inverness tourist office would be a simple leaflet that summarised the main provisions. Of course, the NFUS left the access forum a year ago, so no discussion has taken place since. I do not understand the evidence that it gave last week.

Stewart Stevenson: You think that the NFUS's evidence was based on misunderstanding and a different viewpoint.

Dave Morris: I cannot comment.

The Convener: What would the code's status be?

Dave Morris: In the access forum's discussions, the code has always been described as having evidential status. We understood that to mean

that, if someone sought an interdict, either side could deploy the code in a court dispute to support their point of view. The code would have no more status than that.

The Convener: Why would it help in court proceedings to have the provisions in a code rather than in the bill?

Dave Morris: Once people are in court proceedings, they will get into the fine-scale interpretation of the circumstances and why someone did this or that. All the detail of how someone acts responsibly should be in the code, as it is to the code that they will refer

The Convener: Before we go any further, our sound engineers have made a plea for people to switch off their mobile phones. The buzzing sound that we can hear in the room is caused by people having their mobile phones switched on.

You would like more of the bill's provisions to be transferred to the code. How should the committee identify which aspects of the bill should be in the code?

Dave Morris: We suggest that the committee's general approach should be to examine the bill line by line to test whether each provision would reduce the existing common-law position, as we understand it. If we were to go up Ben Wyvis today, I could pick blaeberries. However, in a year's time, because of a line in the bill, I am not sure that I will be able to do that.

At the moment, if there is snow on the ground, I can go to Inverness golf course and cross-country ski or sledge without any difficulty. The golf course is happy to permit that. However, because of a line about golf courses in the bill, I may not be able to do that. I urge the committee to take everything out of the bill that it feels should be put into the code. That would make the code compatible with the position that was set out by Alan Blackshaw.

The Convener: You mentioned golf courses, about which we have received a number of submissions. Is it your view that the bill should include a right of access to golf courses?

Dave Morris: Yes. A right of access over golf courses should be included. We would like the bill to be amended slightly. There is no reason why there should not be recreation on, as well as passage over, golf courses. The code should deal with such issues. As I indicated, as the bill stands, people may not be able to sledge or cross-country ski on a golf course. Those are important activities when we get a decent fall of snow.

The Convener: Would you make a distinction between private and public golf courses or should the right apply to all golf courses?

Dave Morris: It should apply to all. The Inverness golf course has worked out how to manage access; it indicates where the greens and the tees are. We have always said that there should be no access over the greens and tees. All that detail can be written into the code. Many golf courses demonstrate how access can be given successfully.

The Convener: Can you give the committee evidence of the amount of land that is taken up by golf courses?

Dave Morris: Someone such as Andy Wightman could give that sort of detail. The committee should be aware that the location of golf courses is often crucial. This is a side issue in terms of the bill, but we are engaged in a debate about planning controls over the location of golf courses. Far too many new golf courses are being built right up against river banks and the coastline. That is a problem.

Stewart Stevenson: Do you believe that section 6(g)(i) and section 6(g)(ii), which relate to land to which

"for not fewer than 90 days … members of the public were admitted only on payment",

applies to golf courses? If so, does the bill give the public the right to play golf on golf courses or the right of access to golf courses?

Dave Morris: My understanding is that section 6(g)(ii) refers only to members of the public who are admitted for the activity for which they make payment. When I raised that issue with the Executive, it indicated that that was the intention, although the wording seems a little obscure.

Stewart Stevenson: When we draw up amendments, we should ensure that that section of the bill reflects the understanding that the Executive gave to you.

Dave Morris: Yes.

The Convener: I turn to the earlier question of how to ensure that people can exercise their responsible right of access. My favourite example is the Ardverikie estate, otherwise known as Glenbogle in "Monarch of the Glen". I know you have had recent experiences there. I can think of no better practical example of a place to which an ordinary Scot might wish to go to look at the scenery and exercise their right of access. However, I am concerned about what happens if they come up against a deterrent in some shape or form. Any experiences that you have had would be very useful to put on the record.

Lloyd Austin: For a wide range of reasons we do not consider any additional enforcement measures necessary within the bill. On what we might describe as irresponsibility by walkers, we think that the wide range of existing legislation—particularly from our point of view as land

management conservation non-governmental organisations—provides sufficient remedies to address the large number of problems. That includes the wildlife and conservation legislation, the poaching legislation, SNH's byelaw-making powers and section 26, together with what Alan Blackshaw was describing earlier about breach of the peace and malicious mischief.

The Convener: I do not understand how breach of the peace is a remedy when someone is exercising a civil right. I suggest that that is the provision that has been abused most, probably by landowners I have to say. I acknowledge that we are talking about a minority of cases.

Dave Morris: I will give you an example of what happens when a landowner wishes to exclude people. There is an estate south of Edinburgh where I can guarantee that if we try to walk the claimed right of way across it the police will turn up. It has happened to me, and I know somebody who has been charged for supposedly looking through the windows of the house. All the estate does is to ring up the local police station and say, "An incident is occurring on our estate." The police have to come out to investigate the incident, whatever it is. It does not necessarily lead to any charges of breach of the peace—at least, the two times that I have been there that has not happened.

On the general question that you raised, as you approach the legislation you must be very aware of the way in which awkward or maverick landowners might use the legislation to their ends. That is one reason why we were rather interested in the Ardverikie situation. Not long before Christmas, the BBC gave out information about the estate in its "Holiday" programme. The estate appeared to be very private. The website indicated a private beach and private lands around the estate. That was resolved through publicity.

I went there over the new year because I was staying in Badenoch. There was some wonderful snow so I skied down to the estate with my family. We parked at the gate, skied for about an hour and had a picnic on the edge of the lawn of Ardverikie Castle. In a sense there were no difficulties. I saw somebody from the estate as we entered the gate, and the keeper came along when we were having our picnic and we had a pleasant chat. Later we skied back on a higher track. It was dark halfway through that journey and we skied with our head torches. Again, we went past estate staff, who did not react.

The trouble is that there is a general perception about the estate that people should not be going there. There is a private sign at the gate, and the public feel inhibited. There is a danger with this legislation, particularly the section that refers to

"privacy and undisturbed enjoyment of the whole",

that estates that are so inclined will use it to keep people out of the whole area. However, with somewhere such as Ardverikie all that is needed is a restraint on curtilage; in other words, the immediate curtilage of the castle, as well as the lawn, are the only places where there should not be access. When I was there having my picnic it did not occur to me to go any further towards the castle. Balmoral has a right of way past the back of the castle that people can walk at any time, including when the Queen is there.

Curtilage is quite well defined in planning law, in which there is a fairly clear understanding of it. Local authority officers who are involved in the allocation of rates or council tax also have a clear understanding of what domestic curtilage is all about. However, I would not try to go too much beyond that and define in the bill exactly what curtilage is. It is sufficient to say that curtilage is a place where the right of access does not apply—although some serious problems with farmyards still need to be resolved—and the rest of the detail can be put in the access code.

The Convener: Would you advise members of the public who want to exercise their rights under the bill to get to know their rights so that, if they are challenged, they will be able to deal with that challenge? Is that the way forward?

Dave Morris: That is a difficult question to answer. There are a lot of loopholes and problems in the bill as it is drafted, where commercial access is talked about. Alan Blackshaw referred to the evidence of the Scottish Law Commission that there is a real problem. If the Parliament does not get the bill right and does not tie it tightly to the common-law position, people will be able to choose which sort of access right they want to exercise. We do not want to arrive at that dilemma.

16:45

Stewart Stevenson: Let us return to Lloyd Austin's reference to section 26, on SNH powers. Do you agree that, as drafted, that section would not prevent SNH from taking someone whom it felt was threatening the natural environment and chaining them with handcuffs to a post outside the area concerned as a step to protect the natural environment? I am inviting you to suggest that the section is far too open and not specific enough.

Lloyd Austin: Yes, I agree to an extent. The section allows SNH to take any steps apart from putting up fences. However, if SNH followed your suggestion, it would fall foul of some other legislation—kidnap legislation, perhaps.

Stewart Stevenson: Nonetheless, the section

appears to grant SNH the right to exercise that right. It states that SNH

"may take such steps … as appear to it"—

not to anyone else—

"appropriate to protect the natural heritage of land in respect of which access rights are exercisable."

There is no qualification. The section grants the right to SNH to do that.

Lloyd Austin: With the caveat that SNH cannot break other laws. It is important that the section is included in the bill, as it is important that Scotland observes European nature conservation obligations. As the Government's statutory conservation adviser, SNH is the key.

You are asking whether SNH's decisions should be open to challenge, whether there should be a right of appeal or whether the matter should be subject to discussion in the access forums. We would have no difficulty with some mechanism along those lines. We believe that the local access forums should include bodies that are representative of the conservation interests as well as land management interests and access interests, so that they can be involved in conservation discussions.

The Convener: Let us return to what should be included in the bill. Is it necessary to provide some detail in the bill to give landowners sufficient comfort that access rights will not conflict with their management of the land?

Lloyd Austin: Sorry. Could you repeat that?

The Convener: Do you think that there should be some detail in the bill to allow landowners to manage the land in relation to access rights?

Lloyd Austin: For landowners to be able to manage access rights?

The Convener: To manage their land in relation to the rights that we are giving to people to access land.

Lloyd Austin: I will ask Dave Morris to comment further, but what we have said so far is that landowners have the right to use the land in the same way in which they have the right to use the property, whether that be for farming, shooting or whatever. There might be a need to put in a purpose for the code so that land management and access rights can be balanced. However, we argue that most of that should be done in the code.

The Convener: So that should also be in the code.

Dave Morris: An important part of the access forum discussion was on this point. We on the recreational side were keen to give land managers maximum flexibility to manage their land. For example, we said that if they had a problem in a field one morning, they should be able to go down there and put up a notice asking people to stay out.

We do not want to create a bureaucratic situation that involves landowners having to go to the local authority. That is a bit like the system south of the border. However, giving landowners maximum flexibility must be coupled with an understanding that if there is a right of access to all land, and if the landowner is a bit awkward about a temporary problem and tries to shut down too much land, the local authority will take action and try to secure access.

We should remember that temporary restriction of access to land works well at the moment, for example, with potato crops. When potato crops are sprayed with sulphuric acid, the people doing that work simply put up a "Keep out" notice on posts that says that people should keep out for three days or something like that. The systems are in place, but perhaps they need to be extended. John Mayhew has had a lot of experience of this sort of situation so perhaps he can add something.

John Mayhew: I want to add to what both of my colleagues said, based on our experience as an organisation that owns and manages land for a variety of objectives but has an understanding of open access. We have many years' experience of successfully operating open access in conjunction with conservation, woodland management, farming, by us and our tenants, and deer management interests.

We do not feel, as a land manager, that additional powers will be necessary once the bill becomes an act. We feel that the methods of advice, education, providing information, co-operation, and mutual responsibility—the principles on which the bill and the code are founded—have worked the best in the past. Not only we, as a non-governmental organisation landowner, but public and private landowners operate in the same fashion.

As Dave Morris said, there is a difference between the ability to shut down or remove people's rights, which we would not wish to do and do not think is necessary, and the ability to ask users in a polite and responsible way to exercise their rights responsibly in all the ways that are explained in the code. I hope that that gives another perspective in answer to your question.

The Convener: You say in the third paragraph of page 2 of your submission:

"To ensure the most effective implementation possible of this legislation, we recommend that an additional general duty to further the aims of the legislation should be applied to all Government Departments and public bodies."

Where should that duty lie? Do you feel that that provision should be in the bill? If not, is it your view that it is just a general duty that should exist in Government?

Dave Morris: The provision should be in the bill, as I indicated when I mentioned East of Scotland Water earlier. It is very important, for example, for agricultural policy, because we have a lot of difficulty persuading agricultural policy makers to take account of public access. Right across the board, all Government departments or public bodies should have that duty laid upon them by the bill.

The Convener: Do you think that a provision in the bill that was a presumption in favour of access would have a similar effect?

Dave Morris: I think that we need both. It should be clear that the bill is all about giving a presumption of access to the public—which is exercised responsibly—and that duties are also laid on us all, including public bodies, to adhere to and support that.

The Convener: Do you have points that you want to make in summary?

Dave Morris: I want to make a general point. The committee has a great opportunity to pass extremely good legislation. Members will be aware from what we said that many of us have looked to other European countries—to Scandinavia in particular—for such legislation and we think that the bill has a framework to take us in that direction. We indicated that the bill needs significant alteration, but we hope that members will aspire to pass access legislation that is among the best in Europe. That will be extremely valuable, not only for people who live in Scotland but for anyone who wants to visit Scotland.

Lloyd Austin: I want to add something, which is related to the nature conservation provisions that we mentioned. Those provisions are good and should be in the bill, although our evidence suggested minor amendments. On behalf of our cultural heritage and archaeological members, I add that a similar approach should be taken to historical and cultural parts of the countryside. Power, subject to appeal, should be vested in Historic Scotland in the same way as it is in SNH for the natural heritage. Issues such as access to archaeological sites could then be addressed. We did not mention that.

Stewart Stevenson: Do you have a particular site in mind where there is a problem?

John Mayhew: No, but we would be happy to furnish examples to the committee in the future if that would be helpful. We will do that.

The Convener: I thank you for your submission and your evidence, which is very helpful.

Our final witnesses are from Highland Council. I welcome Councillor Michael Foxley and Councillor David Green to the committee. Our stay in Inverness has been good. I thank you for your hospitality.

We invited you to the committee because you have particular expertise and much to say about parts 2 and 3 of the bill, on community right to buy and crofting right to buy. You also want to comment on access. I apologise for your having to sit through a long afternoon, but I am sure that listening to what others had to say was useful.

We will go straight to questions. You can say something at the end of the session and make any points that have not been made.

Mr Morrison: Last week, the committee took evidence from Andy Wightman. He made it clear that his preferred definition of a community is based on postcodes. Highland Council makes a similar point. Why is it essential to use the postcode formula as opposed to polling districts or electoral boundaries?

Councillor David Green (Highland Council): The maps that we circulated to members make it clear that it is more relevant to build up the Lego box with a postcode. Consider Borve and Portree. A huge number of interests may not be relevant to the proposed self-determined area. It is more relevant to go back to the postcode building blocks rather than the polling districts, otherwise one would get too involved in too much of an area that might not be interested in the proposal.

Councillor Michael Foxley (Highland Council): We have done a considerable amount of work and the phrase that we have used throughout our campaign on land reform is community of interest. Last summer, it was made clear to the council that that had to be geographically defined. I would like to spend some time on the key point that we want to get across on the hurdles that we want to be reduced in favour of communities.

I understand that members managed to get a set of our maps. As I said, we have done a fair bit of work. Three examples are given. First, there is the Isle of Eigg. I was involved in the failed bid to buy the island in 1992 and in the successful bid in 1997. With a population of 58, Eigg fits within its own postcode unit, yet it is included in the small isles, which have a total population of 116. As a result, in terms of the percentages for registration and the subsequent ballot, we would have had to persuade the inhabitants on privately owned Muck; the Nature Conservancy Council, which owns Rum; and the National Trust for Scotland, which owns Canna, to come out formidably in support of Eigg. Frankly, that would not have happened.

17:00

My second example is the Loch Shiel jetties. I was involved in a community group that bought the jetties, which are important to west Lochaber as they are the three access points to Loch Shiel. As a result, they very much control the loch. As members will see from map 2a, which is based on the polling districts concerned, we would have had to have involved and have received majority support from communities as diverse as Glenborrowdale in the west and Strontian in the east to have picked up a commitment to control and manage recreational, fishing and other issues on Loch Shiel. On the other hand, map 2b focuses on postcode units which, as David Green said, are used like Lego building blocks. I have been involved in 15 community ownership buyouts and have found that the community of interest largely defines and assembles itself through such postcode units. As map 2b shows, the population within the 10 postcode units amounts to 304 instead of the 835 people in the polling districts.

The best example is probably the very amicable buyout of Borve and Annishader on Skye. Map 3c shows that the postcode units involved almost exactly encompass the estate that was purchased. As we can see from map 3b, the Borve and Annishader estate flows into several polling districts including Portree. If polling districts had formed the basis for the buyout instead of postcode units, the amicable and successful buyout of the estate would have required the support of something like 60 per cent of the inhabitants of Portree. The board of trustees says that the figure would have been more than 50 per cent, but we all know that electoral rolls are never 100 per cent accurate.

That said, I am sure that many of the electorate would be favourably disposed to the idea. However, from a colour-coded list of the electorate in the area—the names of the people affected by the buyout are in yellow and those who are not are in white—members will see that there are five pages of names before we reach a handful of people in one of the postcode units, and then there are another seven pages of names before we reach a substantial group of people who live in Carbost and Borve. After that, there are more names of those not directly involved in the buyout, with a final small cohort of those who were involved.

The council's planning department has done a lot of work on the issue and we believe that, as far as a geographical definition is concerned, the community of interest would define itself through postcode units. Furthermore, we have said that there should be an arbitration process for disputes where two competitive bids for an area of land have been made.

Mr Morrison: As Councillor Foxley said, Highland Council has been involved in a number of community buyouts. I want to highlight one such buyout in Assynt. In the past seven days, there have been some scandalous attempts to discredit the Assynt crofters, particularly with regard to the management of the fishery in Assynt. As Highland Council was heavily involved in the buyout, will you broadly explain how that community has benefited from the measure economically, socially and environmentally?

Councillor Green: The benefits have been quite considerable since they took over. In fact, had the proposed legislation been in place, it would have been a lot easier. The climate would have been a lot friendlier towards the people of Assynt taking control of their own destiny. The best example of the benefits that can be obtained from taking control is the hydro scheme, which has the potential to bring considerable resources into the area. The hydro scheme was possible only because local people had control over migratory fishing rights in the area. Had it not been for that, it would not have been possible to build the hydro scheme. It is a renewable scheme and has the potential to bring considerable resources into the area.

There are other initiatives such as allocating land for housing for local people. There is a whole range of initiatives in the area and they are bringing benefits, but the single most important thing is the confidence that taking control has brought back to the area.

Mr Morrison: I have some brief questions about paragraph 11 of your submission, which deals with salmon fishings. The council has taken the view that the inclusion of salmon fishings in the definition of eligible croft land should be removed from part 3 of the bill. Why did Highland Council come to that view?

Councillor Green: The council held a difficult and protracted discussion, which was led by the good Dr Foxley. His land and environment committee steered upstream and spawned a suggested amendment, which is before committee members. It is probably best if he explains the details.

Councillor Foxley: For many years, the Highland Council has campaigned for mineral and sporting rights to go to the crofting communities. Our initial stance was therefore to support that prospect in part 3. After we heard concerns from several councillors—particularly those from the north and north-east—we met representatives of the Crofting Counties Fishing Rights Group. I had the joy of chairing a two-hour meeting with them and with representatives of the Scottish Crofting Foundation.

It is fair to say that there was a substantial debate about the issue. We were looking at ways to strengthen the existing safeguards. Members will have seen the briefing note from the Highlands and Islands Enterprise community land unit. There are a substantial number of safeguards when a crofting community wishes to exercise the right to buy; it is not merely a compulsory purchase power.

Our solicitor suggested that, to strengthen those safeguards further, we should add a right of appeal for the landowner. Prior to making an investment, trustees asked whether, if a trust owned fishings, the title was secure. The clear information that we got from our chief solicitor was that that title would not be secure. Because we did not want to jeopardise jobs, employment and development, the committee decided that the safest thing at that stage was to transfer that right from part 3, which deals with crofting communities, to part 2, which deals with the community right to buy. However, we included an important caveat. Many of us were aware of and commented on neglected fishings that have not been actively managed. We have asked for compulsory purchase powers to allow a local authority to take action on neglected fishings to be included in the forthcoming local government bill.

We heard a fair amount of anecdotal evidence and we had a clear statement from our own solicitor about security of title. We have subsequently done some work on the fishings, as has the HIE. I would like to give an example, although it is not from the north or north-east. In Lochaber, part of which I represent on the council, 15 salmon rivers are registered on the valuation roll. Of those 15 rivers, parts of five have a crofting interest that is contiguous to fishings. I have represented three of those five rivers in the past and know that it is likely that only one crofting community would be interested in contiguous fishings. That is in Glen Coe, where the fishings are currently for sale—that is how I know about it. In Lochaber, at least, the likely interest is small. As I said, we are doing further work on that and we hope to provide further evidence to the Justice 2 Committee during subsequent proceedings.

Mr Morrison: You have articulated the council's position—and I fondly remember the days when I was bound by collective responsibility—but I would like to know what your personal view is.

Councillor Foxley: Councillor Green has made a bad pun, I will add my own: to be perfectly honest, a lot of what we are discussing is a red herring. I have spoken to many people in the past few weeks and I am aware that only a small number of crofting communities would wish to exercise the right to buy. It is hard to see why a crofting community around a well-managed fishing, which employs local people and to which local people have access, such as the River Thurso, would wish to exercise its right to buy. The issue would arise only when fishings had been neglected.

Mr Morrison: Nevertheless, you must accept that some communities would want to exercise that right.

Councillor Foxley: Yes.

The Convener: You made a point about the security of title with regard to fishing rights. Are you saying that Highland Council has concerns about the security of title of people who claim that they have title at the moment?

Councillor Foxley: Yes, that is the information that we received at our meeting with the Crofting Counties Fishing Rights Group. That applies particularly when the fishings are owned by a trust. If, prior to making an investment in the fishing, the trustees ask their legal advisers whether they have a secure title, the answer is no.

The Convener: Is that not quite a serious matter? Are you saying that people have openly confessed that they are holding titles to which they may not have a right?

Councillor Foxley: No. The point is that the title would not be secure because, if the adjoining crofting community were to carry out a crofting buy-out, overcoming the formidable list of hurdles—

The Convener: But such problems can be remedied. There are ways to fix a flawed title and I presume that provisions to facilitate that could be placed in the bill.

Councillor Foxley: As Alasdair Morrison said, I am bound by collective responsibility. The information that we had was that the title is not secure in that, if the trustees make an investment, they might find that the fishings are subsequently purchased by the crofting community body. The other side of the matter is that the value of the fishings will have increased as a result of the investment and, if the crofting community body can overcome all the hurdles—such as convincing the minister to allow the plan and proving that the plan is in the interest of the fishings and the crofting community—the landowner should not be disadvantaged.

The Convener: Approximately how many cases are we talking about?

Councillor Foxley: We are investigating that at the moment. We are trying to get information from the Crofters Commission and the Scottish Crofting Foundation. According to the information that I received at the end of last week, 79 rivers in the Highland Council area might be associated with

crofting land. I am personally aware of the 15 rivers in the Lochaber area. Five of those are possibly relevant but only one is probably relevant and the part of its fishings that is contiguous to the crofting land is up for sale.

Having talked to many people who have been actively involved in crofting over many years, I am aware that we are talking about a small part of a small number of rivers. We are certainly not talking about hundreds and hundreds of rivers.

The Convener: If that is the case, it seems odd that that is the basis of your argument not to support the transfer of fishing rights. Surely, in a normal situation, the transfer of land ownership would carry with it the rights to minerals and fish.

Councillor Foxley: Yes, and that is the position on which the council has consistently campaigned. A significant number of councillors have been told by their constituents that there is a significant threat to jobs locally and that investment might be postponed or cancelled because the trustees have been advised that their titles might not be secure. That is why we suggested that the provisions on salmon fishings should be moved to part 2 but include powers for local authorities to make a compulsory purchase of neglected fishings.

That is our current position. There is a fair bit of work to do but, sadly, it takes time to accumulate more detailed information. It is surprising that one cannot press a button on a computer and have it pop out how many rivers are concerned.

The reason why we started the work was that I noticed that some people from the Crofting Counties Fishing Rights Group were talking about several hundred rivers being affected—I heard a figure of 790—but that is clearly not the case. For a start, the provision applies only in the crofting counties. Within the crofting counties, only a small number of rivers are likely to be affected.

17:15

Mr Morrison: Is that not just another example of gross distortion by some landowners who have obviously tried to influence the debate in Highland Council and have succeeded? The matter was debated and you were acting on information that was nowhere close to reality.

Councillor Foxley: We intend to come to a conclusion in the near future on just how big the issue is—on how many rivers are affected and how many crofting communities are associated with those rivers.

The Convener: You are stating in your evidence to the committee that that is the view of Highland Council. We have to accept that. I am concerned that you do not have the information on which to base your view. That is the council's position and we have no right to challenge it, but if you want us to take your evidence seriously, you must provide something to back it up.

Rhoda Grant: The argument on title is that if someone was looking for investment, the security for borrowing would be their title. Given that the bill allows for compensation to be paid, the investment would be secure because the investor would get compensation in the event of a buy-out. For instance, if someone were to go to a bank and say, "I need money because I need to invest in this fishery," that investment would be secure and the bank would be happy to give them the money, knowing that, if a buy-out were exercised, the investor would be compensated. The provisions would have no knock-on effects on investment.

Councillor Foxley: I would agree with you, but when that scenario was put to our legal advisers, we received the advice that a bank would not lend money on that basis, because it would not regard the possibility of recouping its investment as secure. I am happy to listen to other legal opinions on that.

Stewart Stevenson: I will not pretend to give legal opinion, but I refer you to particular bits of the bill. I start with compensation. Section 86 states:

"Any person, including an owner or former owner of land or person entitled to sporting interests, who has incurred loss or expense—

(a) in complying with the requirements of this Part of this Act following upon the … application under section 70"

—that is, community right to buy—

"is entitled to recover the amount of that loss or expense from the crofting community body."

It appears that the bill is clearly intended to protect any investments that are made. Therefore, any bank that holds security over a title should have no concern about its ability to recover the investments over which that security has been granted. The intention is clear. If the bill does not achieve that intention, it would be useful for the committee to have further guidance as to how that is that case.

Secondly, I am uncertain as to how the potential compulsory acquisition of land removes title from the present owner. There are already provisions in law for compulsory purchase—for example, for road-building programmes. The title remains with the owner until the acquisition is complete. I suggest that the bill creates a right to pre-empt that title, which is securely in the hands of the owner, in return for appropriate compensation. I invite anyone who attempts to suggest that title per se is removed to point at where that provision is in the bill.

Finally—provided that I have not taken my finger off the appropriate page—I turn to section 71, which deals with criteria for consent. It states:

"Ministers shall not consent … unless they are satisfied … that any salmon fishings to which the application relates are eligible croft land"

and

"that any sporting interests … are eligible sporting interests".

That leads to section 80, which is on the leaseback to owners of sporting interests. Even after the compulsory purchase, the bill protects the interests of the erstwhile owner of the title in having access. Section 80(4) states that

"the annual rent shall be nominal"

and

"the duration of the lease shall be not less than 20 years".

We can have an argument about whether fishings should be included on another basis. Do you accept that the bill attempts to ensure that everyone's interests are protected? If you do not think that the bill achieves that objective, it would be useful if you would point to the specific points at which it fails to do so.

Councillor Foxley: I agree that the bill is attempting to safeguard that position. One of the legal briefings that we received stated that lending institutions would be reluctant to lend on security of title where the title could be impugned at any time by a crofting community body. I appreciate the fact that that is not always the case but depends on the crofting community body exercising a right to buy and having contiguous fishings.

We were also told that where salmon fishings are held by a family trust, the trustees have been given legal advice that it could be in breach of the trust to invest trust funds in future management, because of the threat to title. That would be contrary to the obligation of the trustees.

There were also concerns about the fragmentation of the fishings. We had considerable discussion about the bill. From the point of view of safety of jobs and investment, we want to move salmon fishings from part 3 to part 2 and include a wider compulsory purchase of neglected fishings.

We will investigate the matter further and come back with more information.

Mr Morrison: I would appreciate that. If, after you give evidence and read the *Official Report* of the Rural Development Committee's meeting, the council feels that it wants to revisit its previous decision and submit fresh evidence, I will be happy to see it, given the extensive work that is continuing.

Stewart Stevenson: I will give one tiny example of banks' thinking. I remember being in a board meeting of the bank that employed me. We discussed a lending proposal concerning the right to build four storeys of a building in Manhattan. The right was secured over air, because the right can be transferred from one building to another and hence there are skyscrapers here at the expense of low buildings there. That is an example of an area in which the legislative environment was uncertain and could be changed at any moment. However, the commercial institution, in its normal assessment of risk, had not the slightest difficulty in lending money to someone who wished to purchase that right. That right is more ephemeral than the physical right to fishings, which is the subject of discussion here. I really do not think that banks, in the real world, will have a problem with it.

Councillor Green: We welcome the opportunity to give further evidence.

Rhoda Grant: I have one small question, based on my experience in the Rural Development Committee, which took evidence last week. The Scottish Crofting Foundation put across the point that they wanted the crofters to have to vote by a bigger majority than a simple majority for a crofting community buy-out. The foundation wants a requirement for 75 per cent of crofters to be in favour of a buy-out before it can take place. What are the council's thoughts on that?

Councillor Green: I think that the council's view is that a majority of crofters is sufficient.

The Convener: Just before we finish, I want to get a couple of things to do with access, including some of your concerns, on the record. You said that you are concerned about access through the grounds of schools. Is that to do with security?

Councillor Foxley: Yes, it is primarily a matter of balancing the interests of school security post-Dunblane with responsible access for the wider public. I understand that that issue is close to being resolved by taking into account how school playing fields are defined.

Councillor Green: Yes, that is more or less the position.

The Convener: That is noted. You also spoke about the erection of signs, gates and the improvement of paths. Your statement says:

"The Council wishes the requirement for this consent to be removed or qualified by the provision that it should not be unreasonably withheld."

Could you comment on that concern?

Councillor Foxley: I am afraid that I am not up to speed on that.

Councillor Green: We cannot answer that at the moment. We have been briefed only for parts 2 and 3, which are not the parts concerning access.

The Convener: I have indeed just been told that. That is fair enough.

Does anyone have further points to make in conclusion?

Stewart Stevenson: I have a wee technical point on postcodes.

The Convener: As long as it really is just "a wee technical point".

Stewart Stevenson: It is. I thought that the proposal to base the definition of communities on postcodes was excellent. However, I want it to be made clear for the record whose responsibility it is to allocate postcodes and what public consultation process, if any, takes place when they are changed or reallocated. In other words, how firm would the basis of postcodes be, if we proceeded in that way? It is the best suggestion that has been made so far, but do you know how it would turn out in practice?

Councillor Foxley: I understand that postcodes are decided by the Post Office. They go down to the level of streets or to very small rural communities.

Stewart Stevenson: I believe that it is no longer the Post Office that does that, although I am uncertain.

The Convener: We can get that clarified.

Do the witnesses wish to make any points in conclusion that they feel have not been covered or that they would like to emphasise?

Councillor Green: I thank the Justice 2 Committee for taking time out to hear us here at such short notice. I am very grateful for the opportunity, not only as the convener of the council, but as a working crofter—I am sometimes called an absentee crofter these days because I am in Inverness so much. I very much welcome the proposed legislation and the efforts being put into it.

Councillor Foxley: Like Councillor Green, I appreciate the Justice 2 Committee coming to Inverness and fitting us in. I hope that our points about postcodes have been taken on board.

I want to make a more general point about the hurdles, including those presented by the paperwork involved. I have been personally involved in 15 community buy-outs, each of which was a fragile flower at first. We currently have serious concerns, particularly about the need to register as a company limited by guarantee. Of the 45 buy-outs that we have considered, 20 are not undertaken by companies limited by guarantee, but by trusts, grazings committees or companies limited by shares.

It is important for the process not to become too inflexible at this stage. A good, well-known example is the Isle of Eigg. The membership in that case is three: the Highland Council; the community, represented by the local residents association; and the Scottish Wildlife Trust. That strong partnership has brought formidable benefits. The council and the SWT in particular have brought in experience and knowledge of the environmental issues. One could have got round the small number of parties involved by allowing each component part to grow. However, it should be emphasised that buy-outs are difficult and fragile at first.

The more flexibility that can be permitted as regards the form of the company and the way in which registration is renewed every five years, the better. That is particularly important in the case of an estate—several are located near where I am—that never comes on the market and that either has been owned by the same clan chief or community for hundreds of years or comes on the market only every hundred or so years. We strongly welcome the bill and the Justice 2 Committee's involvement in promoting it. It should be ensured that the bill is effective. To be effective, it needs to be as flexible as possible, and such issues as the 50 per cent hurdle must be overcome, particularly if the wider community is defined. That is a rigorous test. Our investigation suggests that most buy-out attempts would fall because of it.

We welcome the opportunity to speak to the committee today and look forward to having further input as the bill progresses.

The Convener: I thank both of you for your evidence, particularly the maps and other information that you submitted, which we will find very useful. I know that producing that information required a great deal of work and effort.

That brings us to the end of our meeting in Inverness, which, as all members will agree, has been very successful. We were made to feel very welcome. I thank the city of Inverness and note the healthy attendance at the meeting, which will encourage us to come back.

If people are interested in today's proceedings and would like to hear more, they can access the Parliament webcast and listen to the proceedings of next week's meeting, when we will take more evidence on the bill. We will continue to take evidence on the bill over the next two or three weeks. The *Official Report* of today's meeting will be available on the Parliament's website, so members of the public will be able to read every word that was uttered today, believe it or not.

I remind committee members that our next meeting will be on Wednesday 23 January, when we will take evidence on parts 2 and 3 of the Land

Reform (Scotland) Bill. Members have also agreed to undertake visits to Gigha and Lewis to gather evidence on the bill.

I thank Inverness for its hospitality, which we have really enjoyed.

Meeting closed at 17:30.

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